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No. 95-1560

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1995

CROW TRIBE OF INDIANS,
and THOMAS L. TEN BEAR,

Petitioners,

v.

CHUCK REPSIS, individually; and
FRANCIS PETERA, individually,

Respondents.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether this Court's holding in *Ward v. Race Horse*, 163 U.S. 504 (1896), that Wyoming's admission to the Union repeals the treaty right to hunt on the "unoccupied lands of the United States . . . ", should be expressly overruled or deemed not directly applicable to the right of Crow Indians to hunt on unoccupied lands of the United States in Wyoming under Article 4 of the 1868 Fort Laramie Treaty.

2. Whether the establishment of a National Forest by Presidential Proclamation and organic legislation renders such lands "occupied" under Article 4 of the 1868 Fort Laramie Treaty with the Crow Tribe.

3. Whether the Court of Appeals erred in making a factual finding that Wyoming's game regulations should be applied to Crow tribal members under this Court's conservation standard in the absence of any findings by the District Court addressing this issue.

LIST OF PARTIES

The principal parties to this case appear in the caption. In addition, five Indian tribes: the Shoshone-Bannock Tribes, Northern Arapaho Tribe, Northern Cheyenne Tribe, Oglala Sioux Tribe, and Eastern Shoshone Tribe of the Wind River Reservation; and five states: Montana, Colorado, Idaho, South Dakota, and Utah participated as *amici curiae*.

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Petitioners, Crow Tribe of Indians, and Thomas L. Ten Bear, respectfully pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Tenth Circuit entered on December 26, 1995.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 73 F.3d 982 (10th Cir. 1995) and is reproduced at Appendix A hereto, pages App. 1-27. The opinion of the District Court is reported at 866 F.Supp. 520 (D. Wyo. 1994) and is reproduced at Appendix B hereto, pages App. 28-39.

JURISDICTION

The judgment of the Court of Appeals for the Tenth Circuit was entered on December 27, 1995. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTES AND TREATIES INVOLVED

1. The Treaty of Fort Laramie with the Crows, May 7, 1868, art. 4, 15 Stat. 649:

> Article 4. The Indians herein named agree when the agency-house and other buildings shall be constructed on the reservation named, they will make said reservation their permanent home, and they will make no permanent settlement elsewhere, but they shall have the right to hunt

on the unoccupied lands of the United States so long as game may be found thereon, and so long as peace subsists among the whites and Indians on the borders of the hunting districts.

2. Act of July 10, 1890, § 1, 26 Stat. 222:

. . . the State of Wyoming is hereby declared to be a State of the United States of America, and is hereby admitted into the Union on an equal footing with the original states in all respects whatever; and that the Constitution which the people of Wyoming have formed for themselves be, and the same is hereby, accepted, ratified, and confirmed.

3. Wyo. Const., Art. 21, § 26.

The people inhabiting this state do agree and hereby declare that they forever disclaim all right and title to the unappropriated public lands lying within the boundaries thereof, and to all lands lying within said limits owned or held by any Indian or Indian tribes, and that until the title thereto shall be extinguished by the United States, the same shall be and remain subject to the disposition of the United States and that said Indian lands shall remain under the absolute jurisdiction and control of the congress of the United States.

4. Treaty with the Eastern Band Shoshoni and Bannock, July 3, 1868, art. 4, 15 Stat. 673.

5. Treaty of Fort Laramie with the Sioux, Etc., Sept. 17, 1851, art. 5, 11 Stat. 749.

6. Proclamation No. 30, Feb. 2, 1897, 29 Stat. 909.

7. Act of June 4, 1897, Ch. 2, 30 Stat. 11, 39.

Relevant portions of the documents Nos. 4, 5, 6 and 7 are reproduced at Appendix C, hereto, pages App. 40-43.

STATEMENT OF THE CASE

In 1989, Thomas Ten Bear (Ten Bear), a Crow tribal member, was cited by the Wyoming Fish and Game Department for killing an elk in Wyoming in the Big Horn National Forest (BHNF) in violation of state game laws. Following Ten Bear's conviction in state court, this action was brought in federal district court by the Crow Tribe (Tribe), on behalf of its members, and Ten Bear seeking a declaration that the Tribe and its members are entitled to hunt on all "unoccupied lands of the United States" in Wyoming, including the BHNF, pursuant to Article 4 of the 1868 Treaty between the Crow Tribe and the United States.[1] Article 4 provides, in pertinent part, that the Crow Indians have "the right to hunt on the unoccupied lands of the United States so long as game may be found thereon, and so long as peace subsists among the whites and Indians on the borders of the hunting districts."

Following a preliminary ruling on the State of Wyoming's motion to dismiss[2], and an amendment to the

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[1] Contrary to the Tenth Circuit's statement, the Tribe does not assert an "unrestricted" right to hunt in Wyoming under Article 4. (App. 4, 10.) The Tribe conceded that its hunting right may be regulated under standards enunciated by this Court.

[2] The district court granted Wyoming's motion to dismiss the State but permitted the action to proceed with respect to the individually-named defendants, Repsis and Petera (hereinafter referred to as "Repsis").

Tribe's complaint[3], the parties filed cross motions for summary judgment on the issue of whether the Tribe's treaty right to hunt on "unoccupied lands of the United States" under Article 4 applies to the BHNF, where Ten Bear was cited. Repsis asserted, *inter alia*, that the Tribe's action is controlled by this Court's decision in *Ward v. Race Horse*, 163 U.S. 504 (1896) (*"Race Horse"*) which interprets a nearly identical off-reservation hunting provision in another treaty. Repsis also claimed that the lands within the BHNF are "occupied" based upon federal agreements, regulations and statutes which, he argued, permit uses inconsistent with hunting on forest lands.

In November 1994 the District Court issued its decision granting all relief requested by Repsis, holding that the Tribe's claim is controlled by the decision in *Race Horse*. The District Court found that it was compelled to follow *Race Horse* under the doctrine of *stare decisis* (citing *Jaffree v. Board of School Comm'rs of Mobile County*, 459 U.S. 1314, 1315-16 (1983)) since *Race Horse* has not been overruled by this Court. The District Court noted, however, that *Race Horse* is a "much-criticized decision" and cited subsequent lower court decisions which refused to follow it.[4] It specifically stated: "whether or not this court

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[3] The Tribe added a cause of action regarding the construction and maintenance of a seven mile long fence located near the Crow Reservation. This claim was rejected by both lower courts based upon lack of standing and is not presented in this petition.

[4] The cases cited by the District Court are *State v. Arthur*, 261 P.2d 135, 139 (Idaho 1953); *State v. Tinno*, 497 P.2d 1386, 1392 (Idaho 1972); and *Sohappy v. Smith*, 302 F.Supp. 899, 912 (D. Ore. 1969). (App. 33-34.)

agrees that the reasoning or holding announced in *Race Horse* is correct, it remains controlling." (App. 37.)

The Tribe appealed to the U.S. Court of Appeals for the Tenth Circuit where the principal issue was the binding effect of *Race Horse*. The Tribe argued that *Race Horse* is not directly applicable because it involved a different treaty; and that, even though the Court has not expressly overruled Race Horse, the underlying legal principles involved, i.e., state power over wildlife, the equal footing doctrine as applied to off-reservation Indian hunting and fishing rights, reconciliation of Indian hunting and fishing versus state regulation, and governing canons of treaty construction, have been modified or repudiated by this Court.[5] Repsis argued that *Race Horse* continues to be good law; that the facts in this case are "indistinguishable" from *Race Horse*; and, therefore, *stare decisis* should apply. In addition, Repsis argued that the lands within

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[5] The Tribe also pointed out that the Race Horse decision is flawed because it incorrectly stated that Wyoming did not disclaim jurisdiction over Indian lands when it was admitted to the Union. Wyoming's Constitution includes an Indian jurisdictional disclaimer and was ratified by the 1890 Wyoming Admission Act. See, *supra* at 2 (quoting the relevant provisions of Wyoming's Constitution and Admission Act). See also, F. Cohen, *Handbook of Federal Indian Law*, p. 268, n.73 (1982 Ed.), discussing the various state admissions and enabling acts between 1889 and 1959 and noting that Wyoming and Idaho were not admitted through enabling acts containing "disclaimers" of Indian jurisdiction unlike other western states. Cohen, p.268 n.73. Instead, Wyoming and Idaho were admitted by federal admissions acts which ratified state constitutions containing the same disclaimers. The Court in *Race Horse* failed to take this into account in determining Congress' intent, in the process "confusing" the issue. Cohen, p. 268 n.73.

the BHNF are occupied within the meaning of Article 4 of the Crow Treaty.

On December 26, 1995 the Tenth Circuit issued its decision ruling in favor of Repsis on all issues, holding that the Tribe's off-reservation hunting treaty provision and claims are identical to those involved in *Race Horse* and that *Race Horse* remains good law. The Tenth Circuit found the *Race Horse* decision to be "compelling, well-reasoned and persuasive." (App. 26.) Since the Crow Treaty did not grant a "continuing" off-reservation hunting right, but instead one that was "temporary and precarious" the right did not survive the admission of Wyoming to the Union in 1890. (App. 11-14.) The Tenth Circuit also ruled that the federal statute creating the BHNF (the Act of June 4, 1897, 30 Stat. 35-36) rendered the lands within the National Forest occupied for purposes of Article 4. (App. 23-24.) Finally, the Court of Appeals found that even if the Treaty had reserved a continuing right, there was "ample evidence" in the record of the need for state regulation of the Tribe's hunting. (App. 23.) With respect to the latter two determinations, the Court of Appeals decided issues that the District Court had not reached.

REASONS FOR GRANTING THE WRIT

1. The Tenth Circuit's Decision Conflicts With This Court's Decisions Interpreting Off-Reservation Indian Hunting and Fishing Rights.

The Tenth Circuit's decision conflicts with decisions of this Court interpreting off-reservation Indian hunting and fishing rights. By applying *Race Horse*, the Court below failed to take into account this Court's subsequent decisions which reconcile off-reservation treaty hunting rights with state authority to regulate game. This Court has fashioned rules to harmonize and give effect to both the treaty right and principles of state sovereignty. The equal footing doctrine, so prominent in *Race Horse* and the decision below, has become a non-factor, a casualty of the overriding principle that Indian treaty rights may not be abrogated in a backhanded manner.

This Court's subsequent decisions are reflected in *Antoine v. Washington*, 420 U.S. 194, 207 (1975), an off-reservation hunting case. This Court interpreted an agreement, ratified by Congress, which ceded former reservation lands. The agreement provided "the right to hunt and fish in common with all other persons on lands not allotted to said Indians shall not be taken away or in anywise abridged." 420 U.S. at 196. This Court rejected the State's arguments premised upon state authority. It rejected the holding of the Washington Supreme Court that Congress lacked the constitutional power to inhibit the State's exercise of its police power through legislation ratifying a contract to which the State was not a party. 420 U.S. at 201. This Court also found no merit in the claim

that preemption of State regulatory authority over off-reservation tribal hunting and fishing must be stated expressly in the ratifying legislation after the consent of the State had been sought and obtained. This Court stated:

> The proper inquiry is not whether the State was or should have been a consenting party to the 1891 Agreement, but whether [the Tribes] acquired federally guaranteed rights by congressional ratification of the Agreement. Plainly [the Tribes] acquired such rights. Congress exercised its plenary constitutional powers to legislate those federal protected rights into law in enacting the implementing statutes that ratified the Agreement. No congressional purpose to subject the preserved rights to state regulation is to be found in the Acts or their legislative history. Rather, the implementing statutes unqualifiedly, "carr[ied] into effect" and "ratif[ied]" the explicit and unqualified provision of Art. 6 [of the Treaty] that "the right to hunt and fish- . . . shall not be taken away or in anywise abridged." State qualification of the rights is therefore precluded by force off the Supremacy Clause, and neither an express provision precluding state qualification nor the consent of the State was required to achieve that result.

420 U.S. at 205. Further, this Court rejected the State's argument that the treaty provision was merely a promise by the United States that the Indians would be allowed to hunt on ceded land retained by the United States if others also were allowed to hunt on that land. Invoking the well-established canons of treaty construction, it found that: "[t]he ratifying legislation must be construed to

exempt the Indians' preserved rights from . . . state regulation, however, else Congress preserved nothing which the Indians would not have had without that legislation." 420 U.S. at 206.

In sum, there was no hesitancy or equivocation in holding that state authority had been preempted by the Agreement and the subsequent ratifying legislation. The State's equal footing arguments were given short shrift.

A. Subsequent Decisions Of This Court Have Reconciled State Authority Over Game With Indian Treaty Rights To Hunt and Fish.

The Tenth Circuit's decision conflicts with this Court's decisions reconciling state regulation of game with off-reservation Indian hunting and fishing rights. *Race Horse* was this Court's first case dealing with the assertion of off-reservation Indian treaty hunting and fishing rights. The case arose at a time, shortly after the Court's decision in *Geer v. Connecticut*, 161 U.S. 519 (1896), when states were considered to have absolute power to regulate game within their borders. *Geer* established that the states "owned" the wildlife within the state. 161 U.S. 522-33. In *Race Horse* the Court cited *Geer* (163 U.S. at 507) and stated that states have "complete" authority over game (*Id.* at 510), and that the United States "parted with its entire authority over the capture and killing of game" when Wyoming was admitted to the Union. (*Id.* at 515.)

Beginning with *Missouri v. Holland*, 252 U.S. 416 (1920), this Court has consistently upheld federal authority over game against state claims of sovereign authority.

See, e.g., Kleppe v. New Mexico, 426 U.S. 529 (1976); and *Baldwin v. Montana Fish & Game Commission,* 436 U.S. 371 (1978). This Court overruled the *Geer* ownership doctrine in *Hughes v. Oklahoma,* 441 U.S. 322, 335 (1979).

In the area of Indian off-reservation treaty hunting and fishing rights, the watershed case is *Tulee v. State of Washington,* 315 U.S. 681 (1942). The State of Washington argued, citing *Race Horse,* that it could regulate the off-reservation fishing right at issue. 315 U.S. at 683-84 and n.2. The tribal member asserted a right to be completely free from any state regulation. The Court rejected both positions as too extreme and found a middle ground:

> We think the State's construction of the treaty is too narrow and the appellant's too broad; that while the treaty leaves the state with power to impose on Indians equally with others such restrictions of a purely regulatory nature concerning the time and manner of fishing outside the reservation as are necessary for the conservation of the fish, it forecloses the state from charging the Indians a fee of the kind in question here. . . .

315 U.S. at 684-85 (footnote omitted). Following *Tulee,* the Court has developed and applied a "conservation" standard for reconciling Indian treaty rights with state interests in regulation. *Puyallup Tribe v. Department of Game,* 391 U.S. 392, 399-400 (1968); *Department of Game v. Puyallup Tribe,* 414 U.S. 44, 45 (1973); *Puyallup Tribe v. Department of Game,* 433 U.S. 165, 175-76 (1977); and *Washington v. Washington Fishing Vessel Ass'n,* 443 U.S. 658, 682 (1979). Under that test, "the State must demonstrate that its regulation is a reasonable and necessary conservation

measure" as applied to treaty beneficiaries. *Antoine v. Washington*, 420 U.S. at 207.

The lower court's decision conflicts with these precedents. It ignored the now well-established principles that off-reservation hunting rights may co-exist with state regulation and that effect may be given to both. The underpinnings of Race Horse have been eroded by these subsequent decisions.

B. This Court No Longer Applies the Equal Footing Doctrine In The Context Of Resolving Indian Off-Reservation Hunting and Fishing Cases.

Since *Race Horse*, this Court has not applied the equal footing doctrine in the context of off-reservation Indian hunting and fishing. This Court rejected use of the equal footing rule in *United States v. Winans*, 198 U.S. 371 (1905) in a case involving an express off-reservation treaty right to fish. 198 U.S. at 383-84. In *Winters v. United States*, 207 U.S. 564 (1908), this Court upheld an *implied* right to reserved water rights against a claim that it would violate state sovereignty and equal footing. See also, *Dick v. United States*, 208 U.S. 340, 359 (1908) (power of Congress to enact liquor statutes not inconsistent with equal footing of Idaho); *Arizona v. California*, 373 U.S. 546, 597-98 (1963) (United States could impliedly reserve water rights before and after statehood); and *United States v. John*, 437 U.S. 634 (1978) (federal statute granting criminal jurisdiction upheld against Mississippi's argument that statehood divested federal power). In *Antoine v. Washington*,

the Court, citing *Dick v. United States*, held that the Agreement in that case, which had been ratified by Congress, was " 'superior and paramount to the authority of *any state* within whose limits are Indian tribes.' " 420 U.S. at 204 (citation omitted, emphasis added).[6]

Legal scholars have recognized the demise of the equal footing doctrine in the context of off-reservation hunting and fishing rights. See, D.H. Getches, C.F. Wilkinson & R.A. Williams, Jr., *Federal Indian Law*, (3rd Ed.) pp. 781-82 ("*Winans* and *Winters* put to rest the argument that the [equal footing] doctrine gave newly admitted states the same general police power over all lands within states, including Indian country, that the original thirteen states possessed"); R. Clinton, N. Newton & M. Price, *American Indian Law*, (3rd Ed.) pp. 500-01 ("Since the [equal footing] doctrine made little constitutional or legal

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[6] This Court currently applies the equal footing doctrine only in evaluating the conflicting claims to title to lands beneath navigable waters. In this context state claims are predicated on the well-established proposition that prior to statehood the United States holds the bed and banks in trust for future states. See, *Shively v. Bowlby*, 152 U.S. 1, 23-28 (1894); *United States v. Holt State Bank*, 270 U.S. 49, 54-55 (1926); *Montana v. United States*, 450 U.S. 544, 550-51 (1981); and *Utah Div. of State Lands v. United States*, 482 U.S. 193, 195-198 (1987). See, F. Cohen, *Handbook of Federal Indian Law*, (1982 Ed.) pp. 501-507. There is no comparable rationale for subordinating off-reservation treaty hunting and fishing rights to states sovereignty under the equal footing rationale. See, e.g. *United States v. Washington*, 873 F.Supp. 1422, 1443-45 (E.D. Wash. 1994) (contrasting Supreme Court decisions involving title to beds and banks of navigable waters with those involving off-reservation treaty rights to hunt or fish).

sense, it has hardly affected state jurisdiction in the twentieth century."); and C.F. Wilkinson, *American Indians, Time and the Law,* (Yale Press 1987), p. 26, n.93 ("[T]he applicability of the equal footing doctrine was squarely rejected as to Indian reservations in *United States v. Winans* . . . ").

In short, prior to the decisions below, the holding of *Race Horse* predicated on the equal footing doctrine had been thoroughly discredited and discarded.

C. The Tenth Circuit's Decision Conflicts With This Court's Decisions Regarding Abrogation Of Treaty Rights.

This Court has frequently applied the test for determining whether an Indian treaty right has been abrogated, including Indian hunting and fishing rights. *South Dakota v. Bourland,* 508 U.S. 679, ___, 113 S.Ct. 2309, 2315-16 (1993); *United States v. Dion,* 476 U.S. 734, 738-40 (1986); *Washington v. Washington Fishing Vessel Ass'n,* 443 U.S. 658, 690 (1979); *Mattz v. Arnett,* 412 U.S. 481, 504-05 (1973); *Menominee Tribe v. United States,* 391 U.S. 404, 412-13 (1968);[7] *United States v. Sante Fe Pacific R. Co.,* 314

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[7] The issue in *Menominee* was whether an implicit treaty hunting and fishing right was extinguished by a 1954 statute terminating federal supervision over the Tribe and providing that state laws would thereafter apply to the Tribe and its members in the same manner as they applied to other persons within its jurisdiction. This Court "declined to construe the [1954 statute] as a back handed way of abrogating the hunting and fishing rights of these Indians." "While the power to abrogate those rights exist . . . 'the intention to abrogate or

U.S. 339, 353 (1941); *Lone Wolf v. Hitchcock*, 187 U.S. 553, 566 (1903). This Court has required that Congress' intent to abrogate a treaty provision be "clear and plain" (*United States v. Dion*, 476 U.S. at 738); be evidenced by "explicit statutory language" (*Id.* at 739); or by an "express declaration" (*Id.* at 739). The Court may examine the legislative history and "surrounding circumstances" as well as the express language of the particular statute. *Id.* at 739. The ultimate question is whether "Congress actually considered the conflict between its intended action on the one hand and Indian treaty rights on the other, and chose to resolve that conflict by abrogating the treaty." *Id.* at 740.

The Tenth Circuit's extinguishment of Article 4 of the Crow Treaty conflicts with these decisions. The Court of Appeals made no attempt to apply these principles, relying instead on the *Race Horse* Court's subordination of the treaty to Wyoming's rights under the equal footing doctrine. Moreover, there was no finding that Congress actually considered the conflict between Wyoming's admission in 1890 and the Crow hunting right under Article 4. According to the Court of Appeals, the silence of Wyoming's admission act was sufficient to manifest an intent to divest the Tribe of its Article 4 hunting rights. Under current law, that is not a proper basis for finding that a treaty right has been abrogated. Moreover, as we have shown, *supra*, at n.5, the Court of Appeals as well as the *Race Horse* Court (163 U.S. at 515) were mistaken. Far

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modify a treaty is not to be lightly imputed to the Congress.' " 391 U.S. 412-13, citations omitted.

from being silent, the relevant statute, Wyoming's Admission Act, ratifies the express disclaimer of jurisdiction over Indian lands in Wyoming's Constitution.

D. The Tenth Circuit's Distinction Between Temporary and Continuing Treaty Rights Is Unprecedented and Does Not Avoid a Conflict With Decisions of This Court and Other Courts.

The Tenth Circuit's application of the equal footing doctrine cannot be reconciled with this Court's subsequent decisions based upon the lower court's purported distinction between temporary and "continuing" treaty rights. (App. 19.) In its decision, the Court of Appeals acknowledged that the equal footing doctrine "does not prevent the United States from creating a right in a territory which would be binding on the state upon its admission to the Union." (App. 19.) It then goes on to qualify that statement by adding: "in order to be binding," the right "must be a 'continuing or perpetual right' " (App. 19.)

There is no basis for this distinction. With the possible exception of *Race Horse,* no decision of this Court has held that certain kinds of off-reservation treaty hunting or fishing rights are more subject to equal footing or to implicit abrogation than others. The Seventh Circuit in *Lac Courte Oreilles Band v. Voigt,* 700 F.2d 341 (7th Cir.), *cert. denied,* 464 U.S. 805 (1983), explicitly rejected the argument that a "temporary" treaty right could be extinguished by implication. 700 F.2d at 345. The treaty right in that case recognized the right to hunt on ceded lands "until required to remove by the President of the United

States." *Id.* While the Seventh Circuit agreed that the right was similar to a "revocable license," it still held that the limitation "makes it no less of a legal right." *Id.* at 356. The decision below conflicts with the Seventh Circuit's decision in *Lac Courte Oreilles*.[8]

Analytically, it makes no sense to afford conditional treaty rights any less protection. Such conditions exist in many treaties. See, discussion *infra* at 18-22. Article 4 of the Crow Treaty states three conditions: (1) there must exist "unoccupied lands of the United States" (i.e., federal lands that are not settled); (2) there must be game in the area; and (3) there must be peace on the borders of the hunting districts. 15 Stat. 649. These conditions qualify the Tribe's off-reservation hunting right principally as against the United States. The actions of the Congress and the executive branch of the federal government will determine which federal lands within the Tribe's pre-1868 hunting districts remain "unoccupied." There is no mention of a future state entering the Union or of other contingencies subject to the control of a future state. Nor is there any necessary or even rational relationship between the qualifying conditions of Article 4 and Wyoming's rights as against the Crow Tribe under the equal footing doctrine.

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[8] The conditional nature of the Crow Tribe's off-reservation hunting right is somewhat analogous to tribal sovereignty which, this Court stated, "exists only at the sufferance of Congress and is subject to complete defeasance." *United States v. Wheeler*, 435 U.S. 313, 423 (1978). Nevertheless, and in part because of the plenary authority of Congress in this area, this Court requires "clear indications" of legislative intent before finding that tribal sovereignty has been divested or limited.

E. The Circumstances of This Case Do Not Warrant the Rigid and Mechanical Application of Stare Decisis.

The considerations underlying *stare decisis* are not particularly weighty in this case. The governing law clearly has changed during the past 100 years. The continued vitality of *Race Horse* has been in doubt at least since the *Winans* decision in 1905. Conditional and unconditional, treaty secured, off-reservation, hunting and fishing rights of numerous tribes have been recognized and protected by this Court, lower federal courts and state supreme courts. There has been little or no justification for any detrimental reliance on *Race Horse* for at least 90 years and there is no showing of any such reliance in this case. The 1868 Treaty of Fort Laramie was a product of conditions which existed more than 125 years ago and cannot be revisited. In this respect, for purposes of *stare decisis*, it is more like the Constitution than a statute. Under these circumstances, the rule of *stare decisis*, to the extent it is applicable to a different treaty with another tribe,[9] should not be rigidly or mechanically applied so as to deprive the Crow Tribe of one of its most valued assets. See and compare, *Quill Corp. v. North Dakota*, 504 U.S. 298, 316-17, 119 (1992); *California v. FERC*, 495 U.S. 490, 498-99 (1990); and *Boys Markets v. Retail Clerks Union*, 398 U.S. 235, 241 (1970).

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[9] See, *Shearson/American Express v. McMahon*, 482 U.S. 220 (1987), in which this Court declined to *extend* the holding of a previous decision to an essentially identical provision of a different, but closely related, statute.

2. The Tenth Circuit's Decision Conflicts With Decisions of Other Federal Courts of Appeal and State Courts of Last Resort Construing the Same and Similar Treaty Provisions.

The Tenth Circuit's decision in this case conflicts with decisions of other federal circuit courts and state courts of last resort. The Idaho Supreme Court has twice construed the same Fort Bridger Article 4 treaty language considered in *Race Horse*. In *State v. Tinno, supra*, the right of the Shoshone-Bannock Tribes to fish off-reservation under Article 4 was upheld. The Court found that "*Race Horse* and the theory it posited have been entirely discredited by the Supreme Court in *Winans* and *Tulee* and require no further discussion." 497 P.2d at 1392, n.6.[10] The Idaho Supreme Court's analysis of the Article 4 treaty right correctly applied the rules, discussed above, that this Court has developed since *Race Horse* relating to off-reservation treaty hunting and fishing rights. 497 P.2d at 1390-92. It also stated that the treaty right was subject to state regulation if the State could establish that it was required for conservation. 497 P.2d at 1390-92.

In a later decision, the Idaho Supreme Court, in *State v. Cutler*, 708 P.2d 853 (Idaho 1985), also interpreted the same Article 4 hunting right provision in the Fort Bridger

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[10] As noted by the Tenth Circuit (App. 26), the Idaho Supreme Court dismissed the appeal based upon lack of jurisdiction, but provided its interpretation of the treaty provision for the benefit of the parties due to the importance of the issue and the likelihood that it would recur. 497 P.2d at 1388. In fact, that prophecy was fulfilled. See, fn.11 *infra*.

Treaty. This case involved the right to hunt within a state-owned wildlife reserve, which the Idaho Supreme Court held was not "unoccupied" lands of the United States. Nevertheless, the Idaho Supreme Court found that the treaty right had continued validity despite *Race Horse*. Significantly, the Idaho Supreme Court affirmed its holding in *State v. Tinno* that the Article 4 hunting right still exists. 708 P.2d at 857.[11] It would be a cruel and unusual outcome of the judicial decision-making process if the Crow Tribe's Article 4 off-reservation treaty hunting right is held foreclosed by *Race Horse* while the identical right of the Tribes whose right was at issue in *Race Horse* is recognized and respected based on the subsequent decisions of the Idaho Supreme Court.

In an earlier case involving the Nez Perce Tribe's right to hunt on "open and unclaimed land of the United States" under the 1855 Treaty of Hell Gate (15 Stat. 957), the Idaho Supreme Court also rejected application of the *Race Horse* decision. *State v. Arthur, supra*. The Idaho Supreme Court held that "the admission of Idaho into the Union does not operate to repeal the reserved right, whatever its scope, to hunt on the 'open and unclaimed land'." 261 P.2d at 138.[12] Specifically addressing the *Race Horse* decision, the Idaho Supreme Court stated: "the

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[11] This subsequent decision by the Idaho Supreme Court affirming *Tinno* obviates the Tenth Circuit's statement that *Tinno* is not valid precedent because it involved a dismissal for lack of jurisdiction.

[12] Idaho was admitted to the Union in the same manner as Wyoming. *See* n.5 *supra*.

United States intended that such rights should be continuing and remain until they were extinguished by appropriate means which did not include the admission of Idaho into the Union." 261 P.2d at 138. It continued:

> Furthermore, later opinions of the United States Supreme Court indicate that the decision in the *Race Horse* case has not been followed on this proposition. *United States v. Winans, . . . Winters v. United States, . . . , Dick v. United States . . . ; Seufert Bros. v. United States, . . . Tulee v. Washington,. . . .*

261 P.2d at 138 (citations omitted). Pointing to this Court's construction of the treaty right in *Seufert Bros. v. United States,* 249 U.S. 194 (1916) the Idaho Supreme Court concluded that "the doctrine set forth in the *Race Horse* case and subsequently in the case of *Kennedy v. Becker, . . . ,* each authored by Justice White, was repudiated.," 261 P.2d at 140 (citation omitted).

The courts of last resort in Michigan, Montana and Washington also have affirmed off-reservation treaty rights reserved under similar treaty provisions. The Michigan Supreme Court in *People v. LeBlanc,* 248 N.W.2d 199 (Mich. 1976), upheld the treaty right of the Ottawa and Chippewa Tribes to hunt "until the land is required for settlement." In Montana, the Supreme Court affirmed the treaty right of the Salish and Kootenai Tribes to hunt on "open and unclaimed lands." *State v. Stasso,* 563 P.2d 562 (Mont. 1977). The Washington Supreme Court affirmed the right under the Point No Point Treaty of 1855 to hunt on "open and unclaimed lands." *State v. Miller,* 689 P.2d 81 (Wash. 1984).

The Sixth, Seventh and Ninth Circuit Courts of Appeal have rejected efforts to subject similar off-reservation provisions to state jurisdiction and control. In *United States v. Michigan*, 471 F.Supp. 192 (W.D. Mich. 1979), *aff'd in relevant part*, 653 F.2d 277 (6th Cir.), *cert. denied* 454 U.S. 1124 (1981), the Sixth Circuit upheld the treaty right to fish "on the lands ceded with the other usual privileges of occupancy, until the land is required for settlement." 471 F.Supp. at 213; 653 F.2d at 278. The district court's decision, affirmed by the Sixth Circuit, rejected any limitation on the treaty right based on its conditional status. 471 F.Supp. at 238. The Seventh Circuit in *Lac Courte Oreilles Band v. Voigt*, affirmed a similar off-reservation right against contentions predicated on state supremacy. See discussion above.

The Ninth Circuit has interpreted similar off-reservation treaty provisions and has expressly refused to follow the *Race Horse* decision on two occasions, *Holcomb v. Confederated Tribes of Umatilla Reservation*, 382 F.2d 1013, 1014 n.3 (9th Cir. 1967); and *Settler v. Lameer*, 507 F.2d 231, 239 (9th Cir. 1974). In *Holcomb*, the Court upheld the Umatilla Tribes' right to hunt under their 1855 Treaty reserving the right to hunt on "unclaimed lands." The Ninth Circuit expressly rejected the argument that the State of Oregon's admission repealed the treaty right. It found that the treaty was entered into after Oregon was admitted and therefore *Race Horse* was technically inapplicable, but added that "the strict holding in *Ward v. Race Horse* has been modified by implication in subsequent decisions. See, *United States v. Winans*, . . . " 383 F.2d at

1014. In *Settler,* the Ninth Circuit construed the off-reservation treaty provision in the Yakima Treaty to fish at "usual and accustomed places." 507 F.2d at 236. It rejected application of the *Race Horse* equal footing holding stating that this aspect of the decision "has been modified by implication." *Id.* at 239. The Ninth Circuit also rejected the contention that *Race Horse* had been affirmed by this Court in *Mescalero Apache Tribe v. Jones,* 411 U.S. 145 (1973). *Id.* at 239 n.19.[13]

3. The Tenth Circuit's Alternate Holding that the Big Horn National Forest Lands Are Occupied Based Upon the 1897 Act Conflicts With Several Decisions of Other Federal Courts of Appeal and State Courts of Last Resort Construing the Same or Similar Treaty Provisions.

This Court also should grant the writ to review the Tenth Circuit's decision that the BHNF lands are "occupied" based upon the establishment of the National Forest by Congress and by Presidential Proclamation in

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[13] In a slightly different context, the Ninth Circuit recently recognized the continuing existence of the Article 4 right under the Fort Bridger Treaty (15 Stat. 673). *Shoshone-Bannock Tribes v. Idaho Fish & Game,* 42 F.3d 1278, 1286 (9th Cir. 1994) ("[f]or more than twenty years [referring to the *Tinno* decision in 1972] the Fort Bridger Treaty has been interpreted to reserve to the Tribes the right to fish on unoccupied lands of the United States."). The D.C. Circuit Court of Appeals also recognized the Article 4 Fort Bridger right in the context of a request for representation in a water rights suit. *Shoshone-Bannock Tribes v. Reno,* 56 F.3d 1476, 1482 (D.C. Cir. 1995) (acknowledging the contingent hunting right in Article 4 of the Fort Bridger Treaty).

1897.[14] (App. 23-24.) The 1897 Presidential Proclamation provides that the BHNF is "hereby reserved from entry and settlement" and "set apart as a Public Reservation" for forest purposes. Proc. No. 30, Feb. 22, 1897, 29 Stat. 909. The Proclamation contains no reference to any rights of the Crow or any other Indian Tribe. The 1897 Act provides generally that:

> [n]o public forest reservation shall be established, except to improve and protect the forest within the reservation, or for the purpose of securing favorable conditions of water flows, and to supply a continuous supply of timber for the use and necessities of citizens of the United States; but it is not the purpose or intent of these provisions, or of the Act providing for such reservations, to authorize the inclusion therein of lands more valuable for the mineral therein, or for agricultural purposes, than for forest purposes.

Act of June 4, 1897, Ch. 2, 30 Stat. at 35. Again, there is no reference to any Indian rights or Indian lands in this statute.

The Tenth Circuit's holding that these federal actions made the BHNF lands occupied and effectively terminated the Tribe's Article 4 hunting rights conflicts with several decisions interpreting similar off-reservation provisions: *Swim v. Bergland*, 696 F.2d 712 (9th Cir. 1983) ("public domain" lands within Caribou National Forest);

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[14] The Tenth Circuit's opinion incorrectly states that the BHNF was established in 1887. App. 24. The 1887 date appears in Wyoming's Answer Brief as a typographical error and was apparently transferred to the Court's opinion.

State v. Miller ("open and unclaimed" lands within Olympia National Forest); *State v. Stasso* ("open and unclaimed" lands within national forest); *Holcomb v. Confederated Tribes of Umatilla Reservation* ("unclaimed lands" within the Whitman National Forest); and *State v. Arthur* ("open and unclaimed lands" within Nez Perce National Forest). In each of these decisions, the courts found no termination of rights based upon general organic federal statutes creating national forests. It is difficult to understand how the BHNF can be classified as "occupied" within the meaning of Article 4 of the Crow Treaty when both the Forest Service and the State of Wyoming allow and encourage hunting on those lands by non-Crow tribal members.

This Court should grant the writ based upon this conflict between the Tenth Circuit and these decisions of other federal courts of appeal and state supreme courts.

4. The Tenth Circuit Erred By Finding That Repsis Met His Burden of Proving a Need for Conservation of the Resource.

The Tenth Circuit found that even if the 1868 Treaty survived Wyoming's admission "there is ample evidence in the record to support the State's contention that its regulations were reasonable and necessary for conservation. . . . " (App. 23.) The Court of Appeals cited affidavit evidence in the record.[15] This holding should be reversed for two reasons. First, the Court of Appeals has decided

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[15] Tenth Circuit Joint Appendix (J.A.), Vol. I at 197-98, 210-12, 265-66, 271-73.

this factual issue, prematurely, before it was reached by the district court. The District Court's decision was based entirely on the binding effect of *Race Horse.*

Second, the record does not support the Tenth Circuit's finding. There is no evidence in the record that hunting by Crow tribal members will have any impact on Wyoming wildlife resources. This Court's clearly enunciated standards place the burden on the state to demonstrate that regulation is necessary to conserve a species. *Department of Game v. Puyallup,* 414 U.S. 44, 46-47 (1973); *Antoine,* 420 U.S. at 207. A state must establish that Indian treaty hunting will threaten the survival of a species. Repsis has not come close to meeting this burden. The affidavit evidence it presented and that is cited by the Tenth Circuit contains no hard evidence or studies or data concerning the impact of Crow hunting in Wyoming.[16]

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[16] One affidavit (J.A. at 270-73) contains general conclusions in support of the principle that *some* form of regulation is required for effective management. But, nowhere in the affidavit is it stated that this must include regulation of hunting by Crow tribal members. Another affidavit (J.A. at 196-98) states that "uncontrolled hunting by unlicensed hunters" has affected game management. But, again, there was no testimony that uncontrolled hunting by Crow Indians had any impact on Wyoming game. The only reference was that the Tribe and its members have not "reported" the numbers of animals killed in Wyoming. This statement could not support the need for regulation since it showed that the State did not know how may animals are taken by tribal members. Another affidavit (J.A. at 274-77) does not support the need for conservation. It contains information concerning a completely different Indian reservation, the Wind River Reservation, and said nothing about off-reservation hunting by Crow tribal members in Wyoming. (J.A. at 274-77.) The final affidavit cited

All that Repsis provided in the district court were his conclusions and speculations as to the potential impact of Indian hunting on Wyoming's resources.

In fact, the record shows that big game populations in Wyoming are not declining. (J.A. at 547-48; 582-610.) To the contrary, the Wyoming Fish and Game Department had *increased* the number of resident and non-resident elk licenses from 331 in 1985 to 993 in 1991. (J.A. at 547-48; 582-610.) Under these circumstances, based upon the record, there is no justification for the State to regulate hunting by Crow tribal members under the applicable standard.

CONCLUSION

"Great nations, like great men, should keep their word." *Federal Power Commission v. Tuscarora Indian Nation*, 362 U.S. 99, 142 (1960) (Black, J. dissenting). *Race Horse* is an aberration, some would say an abomination.[17]

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by the Tenth Circuit (J.A. at 210-11) merely states that the Wyoming Game and Fish Department relies upon hunting license fees for revenues.

[17] In its 1868 Treaty, the Crow Tribe, an ally of the United States, ceded 30 of the 38 million acres recognized as its territory in the First Fort Laramie Treaty of 1851. In return, the Tribe accepted a much smaller reservation along with the *right* to continue to hunt game within its traditional hunting districts for as long as they remained "unoccupied lands of the United States." Crow tribal members hunt for subsistence, not sport. Their right to hunt on their aboriginal lands was "not much less necessary to [their] existence . . . than the atmosphere they breathed." Cf. *United States v. Winans*, 198 U.S. at 381. *Race Horse*

It is a blot on this Court's traditional role of upholding the integrity and the honor of our Country's treaty commitments with its original occupants. This case presents an opportunity for this Court to remove that blot.

Based upon the reasons stated above, Petitioner requests the Court to grant the writ of certiorari.

Respectfully submitted,

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and the decision below would transform that promise, which constituted a major portion of the consideration to the Tribe for its cession of the 30 million acres, into a mirage.

APPENDIX A

CROW TRIBE OF INDIANS,
Plaintiff-Appellant,

and

Thomas L. Ten Bear, Plaintiff,

v.

Chuck REPSIS, individually; Francis Petera, individually, Defendants-Appellees,

Shoshone-Bannock Tribes, Northern Arapahoe Tribe, Northern Cheyenne Tribe, the Oglala Sioux Tribe, Eastern Shoshone Tribe of the Wind River Reservation, State of Montana, State of Colorado, State of Idaho, State of South Dakota, State of Utah, Amici Curiae.

No. 94-8097.

United States Court of Appeals,
Tenth Circuit.

Dec. 26, 1995.

Ronald P. Arnold, Senior Attorney General (William U. Hill, Attorney General, Mary B. Guthrie, Deputy Attorney General, Kristi T. Sansonetti, Special Assistant Attorney General, with him on the brief), Cheyenne, Wyoming, for defendants-appellees.

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Marvin G. Amiotte, Pine Ridge, South Dakota, on the brief for Amicus Curiae Oglala Sioux Tribe; L. Robert Murray, Office of Tribal Attorneys, Wind River Reservation, Ft. Washakie, Wyoming, on the brief for Amicus Curiae Eastern Shoshone Tribe; Marc D. Slonim of Ziontz, Chestnut, Varnell, Berley & Slonim, Seattle, Washington, on the brief for Amicus Curiae Northern Cheyenne Tribe and Northern Arapaho Tribe.

Before KELLY and BARRETT, Circuit Judges, and O'CONNOR*, Senior District Judge.

BARRETT, Senior Circuit Judge.

The Crow Indian Tribe and Thomas L. Ten Bear (collectively referred to as "the Tribe") appeal the district court's order of October 25, 1994, *Crow Tribe of Indians v. Repsis*, 866 F.Supp. 520 (D.Wyo.1994), dismissing the Tribe's complaint for a declaratory judgment and injunctive relief based on alleged violations of its rights under

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* The Honorable Earl E. O'Connor, Senior Judge, United States District Court for the District of Kansas, sitting by designation.

the Treaty with the Crows, 1868, and the Unlawful Inclosures of Public Lands Act, 43 U.S.C. §§ 1061-1066.

Facts

On November 14, 1989, Thomas L. Ten Bear, a Crow tribal member and resident of Montana, was cited by Chuck Repsis, a game warden employed by the Wyoming Fish and Game Department, for shooting and killing an elk on lands within the Big Horn National Forest without a Wyoming hunting license. Ten Bear was prosecuted and convicted of illegally killing an elk in violation of Wyo. Stat. § 23-3-102(a). As part of his unsuccessful defense, Ten Bear argued that he had an unrestricted right to hunt in the Big Horn National Forest as "unoccupied lands of the United States" under Article 4 of the Treaty with the Crows, 1868.

In the Treaty of Fort Laramie with Sioux, etc., 1851, 11 Stat. 749, approximately 38.5 million acres of land in the present day states of Montana and Wyoming were identified as Crow territory. This territory included what is now the Big Horn National Forest. In 1868, the Treaty of Fort Laramie with Sioux, etc., 1851, was modified by the Treaty with the Crows, 1868, wherein the Tribe ceded much of its territory, including the area of the Big Horn National Forest.

Both treaties dealt with the right of the Tribe and its members to hunt within aboriginal tribal lands and on

ceded land. Article 4 of the Treaty with the Crows, 1868, provided that:

> The Indians herein named agree, when the agency house and other buildings shall be constructed on the reservation named, they will make said reservation their permanent home, and they will make no permanent settlement elsewhere, *but they shall have the right to hunt on the unoccupied lands of the United States so long as game may be found thereon, and as long as peace subsists among the whites and Indians on the borders of the hunting districts.*

Treaty with the Crows, 1868, 15 Stat. 649, 650 (emphasis added).

The Tribe initiated this action on January 6, 1992, against the State of Wyoming, the Wyoming Department of Game and Fish, the Wyoming Game and Fish Commission, and individual defendants Chuck Repsis, Director of the Wyoming Department of Game and Fish, and Francis Petera, Director of the Wyoming Game and Fish Commission (collectively referred to as "the State"). The Tribe sought a declaration that the treaties entered into between the Tribe and the United States in 1851 and 1868 reserved to the Tribe and its members the unrestricted right to hunt and fish on all "unoccupied land of the United States" in Wyoming, which the Tribe ceded in 1868, including but not limited to national forest lands. The complaint was subsequently amended to include an additional count seeking the removal of a six-mile long "elk proof fence" constructed by the State along the southern border of the Crow Indian Reservation on the grounds that the fence violated the Unlawful Inclosures

of Public Lands Act (UIA), 43 U.S.C. §§ 1061-1066, and the Tribe's treaty rights under the 1851 and 1868 treaties.

On February 4, 1992, the State filed a motion to dismiss the action based on the State's immunity from suit under the Eleventh Amendment. On June 11, 1992, the district court granted the State's motion to dismiss with respect to the State of Wyoming, the Department of Game and Fish, and the Game and Fish Commission on the grounds that the action against those defendants was barred under the Eleventh Amendment. However, the district court allowed the action to continue against the individual defendants.

On October 8, 1993, the district court heard oral argument on the State's and the Tribe's motions for summary judgment. On October 25, 1994, the district court entered its Decision Granting Defendants' Motion for Summary Judgment and Dismissing Case. The district court found that the Tribe's off-reservation hunting right was foreclosed by *Ward v. Race Horse*, 163 U.S. 504, 16 S.Ct. 1076, 41 L.Ed. 244 (1896). *Crow Tribe*, 866 F.Supp. at 522-24. The district court also found that the Tribe had no standing to bring an action under the UIA and that, in any event, no relief could be granted because the Wyoming Game and Fish Commission, rather than the individual defendants, constructed, owned, and maintained the fence. *Id.* at 524-25.

Issues

On appeal, the Tribe contends that: (1) its unrestricted right to hunt and fish on off-reservation ceded lands under the Treaty with the Crows, 1868, was not

foreclosed by *Ward v. Race Horse*, and (2) it has standing and may maintain an action against Francis Petera, Director of the Wyoming Game and Fish Commission, for violations of the UIA.[1]

The State contends that *Race Horse* controls; therefore, the Tribe's right to hunt which was reserved in the treaty was repealed by Wyoming's admission into the Union. In the alternative, the State contends that the Tribe has no right to hunt on the lands of the Big Horn National Forest because such lands are "occupied."

We review the grant or denial of summary judgment *de novo*, applying the same legal standard used by the district court under Fed.R.Civ.P. 56(c). *Wolf v. Prudential Ins. Co. of Am.*, 50 F.3d 793, 796 (10th Cir.1995) (citation omitted). "Summary judgment is appropriate when there is no genuine dispute over a material fact and the moving party is entitled to judgment as a matter of law," *Russillo v. Scarborough*, 935 F.2d 1167, 1170 (10th Cir.1991), but "we must view the record in a light most favorable to the parties opposing the motion for summary judgment." *Deepwater Invs., Ltd. v. Jackson Hole Ski Corp.*, 938 F.2d 1105, 1110 (10th Cir.1991).

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[1] Although the Tribe discusses its right to "hunt and fish," there is nothing in the Treaty with the Crows, 1868, regarding fishing rights. Therefore, we restrict our discussion to the right to hunt as it was expressly delineated in the treaty.

Discussion

I. Off-Reservation Hunting Right

The Tribe contends that the district court erroneously relied on *Race Horse*. The Tribe asserts that: (1) *Race Horse* is factually dissimilar to this case, and (2) the Supreme Court has overruled, repudiated and disclaimed each of the legal doctrines applied in *Race Horse*.

A.

The Tribe asserts that *Ward v. Race Horse* is factually dissimilar from this action and, therefore, not controlling. The Tribe argues that: (1) the Court in *Race Horse* was concerned with the Fort Bridger Treaty of 1869 involving the Shoshone and Bannock Indians whereas this case concerns the Treaty with the Crows, 1868, and (2) in *Race Horse*, the petitioner argued that he was completely immune from state game laws whereas here the Tribe acknowledges that its right is subject to state game laws provided the State can show the regulation is needed for essential conservation purposes.

1.

In *Race Horse*, the Court considered whether the language of the Fort Bridger Treaty of February 24, 1869, between the United States and the Bannock Indians that "they shall have the right to hunt upon the unoccupied lands of the United States so long as game may be found thereon" gave the Indians an unrestricted right to hunt in violation of Wyoming's game laws. 163 U.S. at 504, 16

S.Ct. at 1076. In formulating the issue, the Court stated that:

> It is wholly immaterial, for the purpose of the legal issue here presented, to consider whether the place where the elk was killed is in the vicinage of white settlements. It is also equally irrelevant to ascertain how far the land was used for a cattle range, since the sole question which the case presents is whether the treaty made by the United States with the Bannock Indians gave them the right to exercise the hunting privilege, therein referred to, within the limits of the State of Wyoming in violation of its laws. If it gave such right, the mere fact that the State had created school districts or election districts, and had provided for pasturage on the lands, could no more efficaciously operate to destroy the right of the Indian to hunt on the lands than could the passage of the game law. If, on the other hand, the terms of the treaty did not refer to lands within a State, which were subject to the legislative power of the State, then it is equally clear that, although the lands were not in school and election districts and were not near settlements, the right conferred on the Indians by the treaty would be of no avail to justify a violation of the state law.

Id. at 507, 16 S.Ct. at 1077.

The language that concerned the Court was in Article 4 of the treaty which provided that:

> The Indians herein named agree, when the agency house and other buildings shall be constructed on their reservations named, they will make said reservation their permanent home, and they will make no permanent settlement

> elsewhere; *but they shall have the right to hunt on the unoccupied lands of the United States so long as game may be found thereon, and so long as peace subsists among the whites and Indians on the borders of the hunting districts.*

Id. at 505, 16 S.Ct. at 1076 (emphasis added).

This is the same language found in Article 4 of the Treaty with the Crows, 1868. *See* Treaty with the Crows, 1868, Article 4, 15 Stat. at 650. Since the Court's focus was on the interpretation of the emphasized language, it is immaterial whether it appears in the Fort Bridger Treaty of 1869 or the Treaty with the Crows, 1868.[2]

2.

On appeal, the Tribe recognizes its treaty hunting and fishing rights are subject to State regulation "in the interest of conservation, provided the regulation meets appropriate standards and does not discriminate against the Indians." *Puyallup Tribe v. Department of Game of Wash.*, 391 U.S. 392, 398, 88 S.Ct. 1725, 1728, 20 L.Ed.2d

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[2] This is consistent with the Court's decisions in *United States v. Winans*, 198 U.S. 371, 25 S.Ct. 662, 49 L.Ed. 1089 (1905) (treaty of 1859 made with the Yakima Indians), and *Puyallup Tribe v. Department of Game of Wash.*, 391 U.S. 392, 88 S.Ct. 1725, 20 L.Ed.2d 689 (1968) (*Puyallup I*) (Treaty of Medicine Creek made with the Puyallup and Nisqually Indians in 1854). These cases involved the interpretation of identical provisions of two separate treaties with two separate Indian tribes providing "the right of taking fish at all usual and accustomed places, in common with citizens of the Territory." See *Puyallup I*, 391 U.S. at 397, 88 S.Ct. at 1728.

689 (1968) (*Puyallup I*). However, recognizing this limitation on appeal does not distinguish its argument from that of the Bannock Indians in *Race Horse*. In its complaint, the Tribe argued that the treaties "reserve to [the Tribe and its members] *unrestricted* hunting . . . rights on all of the ceded lands . . . , including but not limited to the National Forest Lands." (J.A., Vol. I at 3 ¶ 7 & 151 ¶ 5) (emphasis added). This is indistinguishable from the argument of the Bannock Indians in *Race Horse*.

B.

The Tribe contends that the Supreme Court has overruled, repudiated, and disclaimed each of the legal doctrines applied in *Race Horse;* therefore, *Race Horse* is not controlling. The Tribe asserts that the Supreme Court has: (1) overruled the doctrine of state plenary control over game; (2) overruled and repudiated the use of the equal-footing doctrine in treaty hunting rights cases; (3) subsequent to *Race Horse*, fashioned rules of treaty construction favoring Indian tribes that have replaced and repudiated those used in *Race Horse;* and (4) specifically reconciled state regulatory authority and Indian off-reservation hunting rights. Finally, the Tribe argues that (5) the State failed to show that conservation measures were required for Crow hunting under the treaty.

In order to address the Tribe's contentions, we must first examine *Race Horse* itself. As noted above, *Race Horse* decided whether the reserved "right to hunt on unoccupied lands of the United States so long as game may be found thereon, and as long as peace subsists among the

whites and Indians on the borders of the hunting districts" reserved to the Indians an unrestricted right to hunt within Wyoming, even in violation of Wyoming's game laws. 163 U.S. at 505, 16 S.Ct. at 1076. The Court approached this issue by first defining the nature of the right reserved to the Indians in the treaty and then determining whether that right had survived Wyoming's admission into the Union.

To determine the nature of the reserved right, the Court examined the literary and historical context of the treaty and Article 4. Initially, the Court concluded that unoccupied lands "were only such lands of that character embraced within what the treaty denominates as hunting districts" and not all the lands ceded by the Indians which were owned by the United States and not yet settled. *Id.* at 508, 16 S.Ct. at 1077-78.

After careful historical analysis, the Court concluded that the hunting right reserved by the treaty "clearly contemplated the disappearance of the conditions therein specified" and was of a "temporary and precarious nature." *Id.* at 510, 16 S.Ct. at 1078. The Court noted that "[t]he construction that would affix to the language of the treaty any other meaning . . . would necessarily imply that Congress had violated the faith of the government and defrauded the Indians by proceeding immediately to forbid hunting in a large portion of the Territory" by the creation of Yellowstone Park Reservation in 1872 "for it was subsequently carved out of what constituted the hunting districts at the time of the adoption of the treaty." *Id.* .

Once it established that the hunting right reserved by the treaty clearly contemplated the disappearance of the conditions specified in the treaty and was thus temporary, the Court addressed the conflict between the Indians' treaty right to hunt and the exercise of this right in violation of the laws of the newly created state of Wyoming. *Id.* at 510-11, 16 S.Ct. at 1078-79.

Wyoming was admitted into the Union on July 10, 1890. 26 Stat. 222, c. 664. Section 1 of the act of admission provides:

> That the State of Wyoming is hereby declared to be a State of the United States of America, and is hereby declared admitted into the Union on an equal footing with the original States in all respects whatever; and that the constitution which the people of Wyoming have formed for themselves be, and the same is hereby, accepted, ratified and confirmed.

Race Horse, 163 U.S. at 506, 16 S.Ct. at 1076-77. "The act contains no exemption or reservation in favor of or for the benefit of Indians." *Id.*

"That 'a treaty may supersede a prior act of Congress, and an act of Congress supersede a prior treaty' is elementary." *Id.* at 511, 16 S.Ct. at 1078 (citations omitted). "Of course the settled rule undoubtedly is that repeals by implication are not favored, and will not be held to exist if there be any other reasonable construction. But in ascertaining whether both statutes can be maintained it is not to be considered that any possible theory, by which both can be enforced, must be adopted, but only that repeal by implication must be held not to have taken place if there be a reasonable construction, by

which both laws can coexist consistently with the intention of Congress." *Id.* (citations omitted).

> Determining, by the light of these principles, the question whether the provision of the treaty giving the right to hunt on unoccupied lands of the United States in the hunting districts are now embraced within the limits of the State of Wyoming, it becomes plain that the repeal results from the conflict between the treaty and the act admitting that State into the Union. The two facts, the privilege conferred and the act of admission, are irreconcilable in the sense that the two under no reasonable hypothesis can be construed as co-existing.

Id. at 514, 16 S.Ct. at 1079-80.

The Court "conceded that where there are rights created by Congress, during the existence of a Territory, which are of such a nature as to imply their perpetuity, and the consequent purpose of Congress to continue them in the State, after its admission, such continuation will, as a matter of construction, be upheld, although the enabling act does not expressly so direct." *Id.* at 515, 16 S.Ct. at 1080. However, "[h]ere the nature of the right created gives rise to no such implication of continuance, since, by its terms, it shows that the burden imposed on the Territory was essentially perishable and intended to be of limited duration."[3] *Id.* Therefore, the treaty "does

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[3] In July, 1868, the act which provided for a temporary government for the Territory of Wyoming was passed and provided:

> That nothing in this act shall be construed to impair the rights of person or property now pertaining to the

not give [the Tribe] the right to exercise this privilege within the limits of [Wyoming] in violation of its laws." *Id.* at 504, 16 S.Ct. at 1076.

1.

The Tribe contends that in *Hughes v. Oklahoma*, 441 U.S. 322, 99 S.Ct. 1727, 60 L.Ed.2d 250 (1979), the Supreme Court overruled the doctrine of state plenary control over game relied on in *Race Horse;* therefore, "[t]here is no irreconcilable conflict between the state power to regulate and the exercise of federal authority as mistakenly supposed in *Race Horse.*" (Brief of Appellants at 21). In support of its position, the Tribe cites a string of cases upholding federal authority to regulate wildlife notwithstanding claims of interference with state sovereignty: *Missouri v. Holland*, 252 U.S. 416, 40 S.Ct. 382, 64 L.Ed. 641 (1920); *Hunt v. United States*, 278 U.S. 96, 100, 49 S.Ct. 38, 38, 73 L.Ed. 200 (1928); *Kleppe v. New Mexico*, 426 U.S. 529, 96 S.Ct. 2285, 49 L.Ed.2d 34 (1976); and *New Mexico State Game Comm'n v. Udall*, 410 F.2d 1197 (10th Cir.), *cert. denied*, 396 U.S. 961, 90 S.Ct. 429, 24 L.Ed.2d 426 (1969).

In *Hughes*, the Court expressly overruled the doctrine of state ownership of game, concluding that challenges under the Commerce Clause to state regulation of wild animals should be considered according to the same general rule applied to state regulation of other natural

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> Indians in said Territory, so long as such rights shall remain unextinguished by treaty between the United States and such Indians.

Race Horse, 163 U.S. at 506, 16 S.Ct. at 1076.

resources. 441 U.S. at 322, 99 S.Ct. at 1729. *Hughes* involved an Oklahoma statute that prohibited the transportation or shipping outside the State of natural minnows seined or procured from waters within the State for sale. *Id.* The Court struck down the statute as facially discriminatory against interstate commerce and "repugnant to the Commerce Clause." *Id.* at 337-38, 99 S.Ct. at 1737. However, in so doing, the Court reiterated that:

> The overruling of *Geer* [*v. Connecticut*, 161 U.S. 519 [16 S.Ct. 600, 40 L.Ed. 793] (1896),] does not leave the States powerless to protect and conserve wild animal life within their borders. Today's decision makes clear, however, that States may promote this legitimate purpose only in ways consistent with the basic principle that 'our economic unit is the Nation,' and that when a wild animal 'becomes an article of commerce its use cannot be limited to the citizens of one State to the exclusion of citizens of another State.'

Id. at 338-39, 99 S.Ct. at 1737-38 (internal citations omitted).

"Unquestionably the States have broad trustee and police powers over wild animals within their jurisdiction." *Kleppe*, 426 U.S. at 545, 96 S.Ct. at 2294 (citations omitted). "But, as *Geer v. Connecticut* cautions, those powers exist only 'in so far as [their] exercise may be not incompatible with, or restrained by, the rights conveyed to the Federal government by the Constitution.' " *Id.* (citing *Geer*, 161 U.S. at 528, 16 S.Ct. at 604). *See also Baldwin v. Fish and Game Comm'n of Mont.*, 436 U.S. 371, 386, 98 S.Ct. 1852, 1861-62, 56 L.Ed.2d 354 (1978) ("The fact that

the State's control over wildlife is not exclusive and absolute in the face of federal regulation and certain federally protected interest does not compel the conclusion that it is meaningless in their absence); *Puyallup I*, 391 U.S. at 399, 88 S.Ct. at 1729 ("The overriding police power of the State, expressed in nondiscriminatory measures for conserving fish resources, is preserved."); *Tulee v. Washington*, 315 U.S. 681, 684, 62 S.Ct. 862, 864, 86 L.Ed. 1115 (1942) (the state has the power to regulate as necessary for the conservation of fish); *Hunt*, 278 U.S. 96, 49 S.Ct. 38 (the power of the federal government to regulate game independent of state game laws springs from the federal ownership of the lands affected pursuant to the Property Clause); *Holland*, 252 U.S. 416, 40 S.Ct. 382 (valid treaty and statute preempt state regulation under the treaty making power conferred by Art. II, § 2 of the Constitution).

Therefore, the Court in *Hughes* has not stripped the states of their authority to regulate and control game; it has merely removed the 19th century legal fiction of state ownership of game. *Hughes*, 441 U.S. at 336, 99 S.Ct. at 1736. And absent any conflict between federal and state authority to regulate the taking of game, the state retains the authority, even over federal lands within its borders. *Kleppe*, 426 U.S. at 543, 96 S.Ct. at 2293-94 (citations omitted).

In *Race Horse*, the Court recognized the "power of a State to control and regulate the taking of game." 163 U.S. at 507, 16 S.Ct. at 1077. However, contrary to the Tribe's assertion, the Court did not find a "plenary" power to regulate the taking of game nor did the Court rely on

such a power in reaching its decision. The Court stated that:

> Nor need we stop to consider the argument advanced at bar, that as the United States, under the authority delegated to it by the Constitution in relation to Indian tribes, has a right to deal with that subject, therefore it has the power to exempt from the operation of state game laws each particular piece of land, owned by it in private ownership within a State, for nothing in this case shows that this power has been exerted by Congress.

Id. at 514, 16 S.Ct. at 1080. Furthermore, the "irreconcilable conflict" in *Race Horse* was between the right conferred by the treaty and the act admitting Wyoming into the Union, not between the state's power to regulate and the exercise of federal authority. 163 U.S. at 514, 16 S.Ct. at 1079-80.

2.

The Tribe asserts that a "major premise" of the Court's decision in *Race Horse* was the equal-footing doctrine which has since been overruled and repudiated in the context of off-reservation treaty rights.

The equal-footing doctrine requires that all states admitted into the Union after the original thirteen states be admitted on "equal-footing" with the original states; the newly admitted states must have the same rights and sovereignty at the time of admission as the original states. *California ex rel. State Lands Comm'n v. United States*, 457 U.S. 273, 281 n. 9, 102 S.Ct. 2432, 2437 n. 9, 73 L.Ed.2d 1 (1982) (citing *Pollard v. Hagan*, 44 U.S. (3 How.) 212, 229,

11 L.Ed. 565 (1845), and *Shively v. Bowlby*, 152 U.S. 1, 26 & 30, 14 S.Ct. 548, 557 & 559, 38 L.Ed. 331 (1894)).

In *United States v. Winans*, 198 U.S. 371, 371, 25 S.Ct. 662, 662, 49 L.Ed. 1089 (1905), the Court upheld an Indian treaty right to take "fish at all usual and accustomed places in common with the citizens of the Territory of Washington" concluding that the treaty language imposed a servitude on the lands bordering the Columbia River that was intended to be continuing against the United States and its grantees and the State and its grantees. In *Winans*, the Indians sought access across lands bordering the Columbia River which were privately owned either under patent from the United States or grant from the state of Washington in order to exercise their treaty fishing right. *Id.* at 379, 25 S.Ct. at 663.

In interpreting the treaty language, the Court determined that although the Indians were not given an exclusive right but one "in common with citizens of the Territory," their right was a continuing one. *Id.* at 381-82, 25 S.Ct. at 664-65. The Court concluded that:

> The contingency of the future ownership of the lands, therefore, was foreseen and provided for – in other words, the Indians were given the right in the land – the right of crossing it to the river – the right to occupy it to the extent and for the purpose mentioned. No other conclusion would give effect to the treaty. And the right was intended to be continuing against the

> United States and its grantees as well as against the State and its grantees.

Id.

Once the Court determined that the right to fish was a continuing right, it addressed the state's argument that the equal-footing doctrine prevented the United States from granting or retaining rights in the shore or to the lands under the water. *Id.* at 382-83, 25 S.Ct. at 664-65. The Court held that while the United States held the lands as a Territory, it had the power to create rights which would be binding on the States, *id.* at 383, 25 S.Ct. at 665; therefore, "surely it was within the competency of the Nation to secure to the Indians such a remnant of the great rights they possessed as 'taking fish at all usual and accustomed places.' " *Id.* at 384, 25 S.Ct. at 665.

Hence, the equal-footing doctrine does not prevent the United States from creating a right in a territory which would be binding on the state upon its admission into the Union. However, in order for such a right to be binding on the state, it must be a continuing or perpetual right – a right that is intended at its formation to be continuing against the United States and its grantees, including the state. *See Winans*, 198 U.S. at 381-82, 25 S.Ct. at 664-65.

In *Race Horse*, the Court was fully aware of Congress's power to create binding continuing rights. 163 U.S. at 515, 16 S.Ct. at 1080. However, the Court concluded that the right conferred by the Treaty with the Crows, 1868, was "temporary and precarious"; it was not a continuing right. *Id.* In addition, the Court found that it was the intent of Congress to repeal the right to hunt

upon Wyoming's admission to the Union. *Id.* at 515, 16 S.Ct. at 1080. The Court stated:

> Nor would this case be affected by conceding that Congress, during the existence of the Territory, had full authority in the exercise of its treaty making power to charge the Territory, or the land therein, with such contractual burdens as were deemed best, and that when they were imposed on a Territory it would be also within the power of Congress to continue them in the State, on its admission into the Union. Here the enabling act not only contains no expression of the intention of Congress to continue the burdens in question in the State, but, on the contrary, its intention not to do so is conveyed by the express terms of the act of admission.
>
> * * *
>
> Indeed, the whole argument of the [Indians] rests on the assumption that there was a perpetual right conveyed by the treaty, when in fact the privilege given was temporary and precarious.

Id.

3.

The Tribe asserts that the Supreme Court has, subsequent to *Race Horse*, fashioned rules of treaty construction favoring Indian tribes that have replaced and repudiated those used in *Race Horse*. The Tribe asserts that "*Race Horse*'s application of rules of treaty construction to resolve the supposed conflict between Wyoming's admission to the Union and the [Treaty with the Crows, 1868,] has been discredited and no longer represents the law;"

therefore, *Race Horse* should not be followed. (Brief of Appellants at 30).

In fact, it was in 1832, sixty-four years prior to the Court's decision in *Race Horse*, that the Court determined that:

> The language used in treaties with the Indians should never be construed to their prejudice. If words be made use of, which are susceptible of a more extended meaning than their plain import, as connected with the tenor of the treaty, they should be considered as used only in the latter sense. . . . How the words of the treaty were understood by this unlettered people, rather than their critical meaning, should form the rule of construction.

Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 582, 8 L.Ed. 483 (1832). *See also In re Kansas Indians*, 72 U.S. (5 Wall.) 737, 760, 18 L.Ed. 667 (1866); *United States v. Kagama*, 118 U.S. 375, 6 S.Ct. 1109, 30 L.Ed. 228 (1886); *Choctaw Nation v. United States*, 119 U.S. 1, 28, 7 S.Ct. 75, 90-91, 30 L.Ed. 306 (1886). Therefore, contrary to the Tribe's view, the canon of construction favoring the Indian interpretation and resolving ambiguities in favor of the Indians was well established at the time the Court decided *Race Horse* in 1896.

Additionally, the Court recognized this canon of construction in *Race Horse* and declined to follow it. The Court stated that:

> Doubtless the rule that treaties should be so construed as to uphold the sanctity of the public faith ought not to be departed from. But that salutary rule should not be made an instrument

> for violating the public faith by distorting the words of a treaty, in order to imply that it conveyed rights wholly inconsistent with its language and in conflict with an act of Congress, and also destructive of the rights of one of the States.

Race Horse, 163 U.S. at 516, 16 S.Ct. at 1080.

4. & 5.

The Tribe asserts that the Supreme Court has reconciled state regulatory authority and Indian off-reservation hunting rights which abolishes any conflict between state regulatory power and treaty rights reserved to the Indians and that the State failed to show that conservation measures were required.

As noted above, the Court has recognized that states may regulate off-reservation treaty rights "in the interest of conservation, provided the regulation meets appropriate standards and does not discriminate against the Indians." *Puyallup I*, 391 U.S. at 398, 88 S.Ct. at 1728. In order to be effective, state conservation regulations must be "reasonable and necessary." *Department of Game of Wash. v. Puyallup Tribe*, 414 U.S. 44, 45, 94 S.Ct. 330, 332, 38 L.Ed.2d 254 (1973) (*Puyallup II*). *See also Puyallup Tribe, Inc. v. Department of Game of Wash.*, 433 U.S. 165, 175, 97 S.Ct. 2616, 2622-23, 53 L.Ed.2d 667 (1977) (*Puyallup III*) ("Rather, the exercise of that right was subject to reasonable regulation by the State pursuant to its power to conserve an important natural resource."); *Tulee*, 315 U.S. at 684, 62 S.Ct. at 865. ("Washington has the power to impose on the Indians equally with others such restrictions of a purely regulatory nature concerning the time

and manner of fishing outside the reservation as are necessary for the conservation of fish.").

However, this is not our case. The Tribe's right to hunt reserved in the Treaty with the Crows, 1868, was repealed by the act admitting Wyoming into the Union. *Race Horse*, 163 U.S. at 514, 16 S.Ct. at 1079-80. Therefore, the Tribe and its members are subject to Wyoming's game laws and regulations regardless of whether the regulations are reasonable and necessary for conservation.

In addition, if the Treaty with the Crows, 1868, had reserved a continuing right which had survived Wyoming's admission, we hold there is ample evidence in the record to support the State's contention that its regulations were reasonable and necessary for conservation. *See* (J.A., Vol. I at 197-98, 210-12, 265-66, 271-73).

C.

As an alternative basis for affirmance of the district court's dismissal of the Tribe's action, the State contends that the Tribe has no right to hunt in the Big Horn National Forest in violation of Wyoming's game laws since the treaty reserved an off-reservation hunting right on "unoccupied" lands and the lands of the Big Horn National Forest are "occupied." Although the district court did not reach this issue, it was raised by the State and "we are free to affirm a district court decision on any grounds for which there is a record sufficient to permit conclusions of law, even grounds not relied upon by the district court." *United States v. Sandoval*, 29 F.3d 537, 542 n. 6 (10th Cir.1994) (citation omitted).

When the Treaty with the Crows, 1868, was executed the lands located in what is now the Big Horn National Forest were unoccupied; they were open for settlement in the westward expansion of the United States. However, in 1887, Congress created the Big Horn National Forest and expressly mandated that the national forest lands be managed and regulated for the specific purposes of improving and protecting the forest, securing favorable water flows, and furnishing a continuous supply of timber.[4] *See* 16 U.S.C. § 475. These lands were no longer available for settlement. No longer could anyone timber, mine, log, graze cattle, or homestead on these lands without federal permission. *See* Act of June 4, 1897, Ch. 2, 30 Stat. at 35-36 (1897). Thus, the creation of the Big Horn National Forest resulted in the "occupation" of the land.

II. Elk Fence

The Tribe contends that the district court erred in dismissing its action relating to the elk fence. The Tribe argues that it has standing to bring this action under the UIA and that it may maintain such action against Francis Petera, Director of the Wyoming Game and Fish Commission.[5]

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[4] In 1960, Congress passed the Multiple-Use Sustained Yield Act of 1960 which provided that "national forests are established and shall be administered for outdoor recreation, range, timber, watershed, and wildlife and fish purposes" as well as the original purposes set forth in 16 U.S.C. § 475. 16 U.S.C. § 528.

[5] Although the claim was originally filed against both individual defendants, on appeal the Tribe challenges the district court's decision solely in regards to Francis Petera,

The Wyoming Game and Fish Commission owns and maintains a fence which is approximately six to seven miles long located near the Kerns Big Game Winter Range. The fence impedes the movement of elk onto private property. The United States, through the Department of Interior, agreed that the elk-proof fence should be constructed; provided matching funds for its construction and maintenance; and approved the subsequent management strategies for the elk contained therein. (J.A., Vol. I at 219-242).

Under the UIA, "it shall be the duty of the United States Attorney for the proper district, on affidavit filed with him by any citizen of the United States that section 1061 . . . is being violated . . . to institute a civil suit in the proper United States district court, or territorial district court, in the name of the United States." 43 U.S.C. § 1062. Thus, the UIA specifically provides for federal enforcement to be brought in the name of the United States; there is no private right of action. *See Camfield v. United States*, 167 U.S. 518, 522, 17 S.Ct. 864, 865-66, 42 L.Ed. 260 (1897) ("it is made the duty of the district attorney . . . to institute a civil suit in the name of the United States").

The role of a private party is explicitly defined as the filing of an affidavit alerting the United States Attorney for the district of potential violations of the UIA. *See* 43 U.S.C. § 1062. Once a case is properly commenced by the United States, it is possible for an interested party, such

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Director of the Wyoming Game and Fish Commission. Therefore, their claim against Chuck Repsis, the Director of the Wyoming Department of Game and Fish, has been abandoned. (Brief of Appellants at 35).

as the Tribe, to obtain permission to intervene. *See United States ex rel. Bergen v. Lawrence*, 848 F.2d 1502, 1504 (10th Cir.) (Wildlife Federation joined as intervenors in UIA case), *cert. denied*, 488 U.S. 980, 109 S.Ct. 528, 102 L.Ed.2d 560 (1988). However, the private party lacks standing to assert a violation of the UIA on its own.

Conclusion

We AFFIRM the district court's grant of summary judgment in favor of the State and dismissal of the Tribe's UIA claim. Unlike the district court's apologetic interpretation of and reluctant reliance upon *Ward v. Race Horse*, we view *Race Horse* as compelling, well-reasoned, and persuasive.[6] Also, contrary to the Tribe's views, there is nothing to indicate that *Race Horse* has been "overruled, repudiated or disclaimed;" *Race Horse* is alive and well.

Race Horse conclusively established that "the right to hunt on all unoccupied lands of the United States so long as game may be found thereon, . . . " reserved a temporary right which was repealed with Wyoming's admission into the Union. 163 U.S. at 504, 16 S.Ct. at 1076. In addition, although the Treaty with the Crows, 1868,

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[6] *State v. Tinno*, 94 Idaho 759, 497 P.2d 1386 (1972), which was authoritatively cited by the district court and argued before us by the Tribe, is obvious by its omission from this opinion. In *Tinno*, the Idaho Supreme Court found that *Race Horse* had been "entirely discredited" and "require[d] no further discussion." *Id.* 497 P.2d at 1392 n. 6. However, this conclusion was made with no analysis and in a case where the court acknowledged that it lacked jurisdiction. *Id.* at 1388 ("We are constrained by I.C. § 19-2804 to hold that the appeal must be dismissed.").

reserved a right to hunt on "unoccupied lands;" the lands of the Big Horn National Forest have been "occupied" since the creation of the national forest in 1887. Therefore, we hold that the Tribe and its members are subject to the game laws of Wyoming.

Finally, we hold that the Tribe, as a private party, lacks standing to bring a suit under the UIA.

AFFIRMED.

APPENDIX B

The CROW TRIBE OF INDIANS and Thomas L. Ten Bear, Plaintiffs,

v.

Chuck REPSIS, Individually, and Francis Petera, Individually, Defendants.

No. 92-CV-1002.

United States District Court, D. Wyoming.

Oct. 25, 1994.

Thomas E. Towe, Towe, Ball, Enright & Mackey, Billings, MT, Bruce P. Badley, Badley & Rasmussen, Sheridan, WY, Robert S. Pelcyger, Dale T. White, Fredericks, Pelcyger, Hester & White, Boulder, CO, for plaintiffs.

Ronald P. Arnold, Wyoming Atty. Gen., Cheyenne, WY, for defendants.

DECISION GRANTING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT AND DISMISSING CASE

ALAN B. JOHNSON, Chief Judge.

This matter is before the court on Cross Motions for Summary Judgment.

The Amended Complaint seeks a declaration that the Tribe and its members, such as Mr. Ten Bear, have an unrestricted right to hunt and fish on Big Horn National Forest lands within the state of Wyoming as reserved in the Fort Laramie Treaty of 1868. Plaintiffs seek declaratory judgment that plaintiffs retain their treaty-based off-reservation hunting and fishing rights on ceded, unoccupied and public lands, that defendants may neither interfere with the exercise of such rights, nor enforce

Wyoming hunting and fishing laws against and regulations against plaintiffs. In addition, plaintiffs contend that the State of Wyoming and its agents erected a six mile long elk fence in violation of their treaty rights as well as in violation of 43 U.S.C. §§ 1061 through 1066, popularly known as the "Unlawful Inclosures of Public Lands Act" and seek injunctive relief barring defendants from maintaining the fence.

Having considered the Motions, the Reply, the memoranda, briefs, affidavits, and being fully advised upon its own review of the applicable statutes and authorities, the court will rule in favor of defendants Repsis and Petera, who have been sued in their individual capacity.

FACTUAL BACKGROUND

Plaintiff Thomas L. Ten Bear is an enrolled member of the Crow Tribe and a resident of Montana. On November 14, 1989, Mr. Ten Bear killed an elk in the Big Horn National Forest, Wyoming. This National Forest land was ceded by the Crow Tribe in the Fort Laramie Treaty of 1858. Mr. Ten Bear did not have a non-resident Wyoming hunting license when he killed the elk. He was apprehended by an agent of the Wyoming Game and Fish Department, defendant Chuck Repsis. Defendant Francis Petera is the Director of the Wyoming Game and Fish Department.[1]

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[1] Under a Memorandum of Understanding between the Wyoming Game and Fish Commission and the United States Forest Service, United States Department of Agriculture; Wyoming Game and Fish agreed to "exercise their primary

Pursuant to Wyo.Stat. § 23-3-102(a), Mr. Ten Bear was charged with taking an elk on National Forest lands without having a Wyoming hunting license. On October 25, 1990, Mr. Ten Bear was found guilty in the County Court of Sheridan, Wyoming of illegally killing an elk. Mr. Ten Bear failed to appear at his sentencing hearing, and a criminal warrant for his arrest is now outstanding.

The Wyoming Department of Game and Fish maintains a fence near the Kerns Big Game Winter Range, approximately six to seven miles in length. The fence is capable of impeding the movement of elk.

The Crow Tribe is a party to two relevant treaties with the United States: The Treaty of Fort Laramie with Sioux, Etc., 1851 and the Treaty with the Crows, 1868. The latter treaty modifies certain provisions of the former treaty. No other Congressional enactment exists which has explicitly modified relevant portions of either treaty. In the Treaty with the Crows, 1868, at Article 4, this language appears:

> "The Indians herein named agree, when the agency-house and other buildings shall be constructed on the reservation named, they will make said reservation their permanent home, and they will make no permanent settlement elsewhere, but *they shall have the right to hunt on the unoccupied lands of the United States so long as game may be found thereon, and as long as peace*

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responsibility for the enforcement of game and fish laws and Commission regulations on all Forest Service administered lands and waters in Wyoming." Master Memorandum of Understanding, ¶ 6(1) attached to affidavit of Jay Lawson (filed on November 16, 1992).

subsists among the whites and Indians on the borders of the hunting districts."

(emphasis added).

CONCLUSIONS OF LAW

Plaintiffs seek declaratory judgment that they retain treaty-based off-reservation hunting and fishing rights on ceded, unoccupied and public lands, that defendants may neither interfere with the exercise of such rights, nor enforce Wyoming hunting and fishing laws and regulations against plaintiffs. Plaintiffs also seek to enjoin defendants from maintaining an elk fence in the vicinity of the Kerns Big Game Winter Range.

Defendants seek summary judgment dismissing the action because they contend: the 1896 case of *Ward v. Race Horse*[2] has already decided that plaintiffs' treaty rights have been abrogated; "game no longer existed; hunting would undermine conservation; federal lands are occupied; defendants are not violating the Unlawful Inclosure Act; and this court lacks subject matter jurisdiction."

Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is any genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed.R.Civ.P. 56(c). In this case, the material facts are not at issue and the parties agree that the case may be disposed of on the issues of law.

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[2] 163 U.S. 504, 16 S.Ct. 1076, 41 L.Ed. 244.

Applicability of the Race Horse Case.

The question of whether Mr. Ten Bear and other members of the Crow Tribe of Indians retain their hunting rights pursuant to the Treaty with the Crows, 1868, may be resolved by answering the question of whether *Ward v. Race Horse* retains vitality.

In the last decade of the nineteenth century, a Bannock Indian named Race Horse[3] was apprehended while hunting on public lands of the United States, located in the state of Wyoming. Mr. Race Horse was apprehended and charged with violating the newly enacted game laws of the State of Wyoming.[4] In *Ward v. Race Horse*, 163 U.S. 504, 16 S.Ct. 1076, 41 L.Ed. 244 (1896), the United States Supreme Court reversed a Wyoming federal district court's grant of habeas corpus relief for Mr. Race Horse, and remanded him to the custody of the local sheriff.

The facts of the *Race Horse* case are not distinguishable from the present case. The identical treaty language preserving Indian hunting rights relied upon by plaintiffs in this case appears at Article 4 of the Treaty of July 3, 1868, 15 Stat. 673, to which the Bannock Indians were party.[5] The petitioner in the Race Horse case advanced

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[3] The petitioner in that habeas corpus case is referred to only as "Race Horse." For purposes of this opinion, the court will refer to him as Mr. Race Horse.

[4] Wyoming became a state on July 10, 1890. The game law was adopted on February 20, 1895, Mr. Race Horse was arrested for killing seven elk on July 1, 1895.

[5] The Articles 4 of the two treaties are identical except that the Crow treaty refers to reservations in the singular and the Fort Bridger treaty at issue in Race Horse refers to reservations in the plural.

the identical contention now made by plaintiffs: that they are not subject to any restrictions imposed by Wyoming's game laws because pursuant to treaty they possess the right to hunt on all unoccupied lands owned by the United States and located in the state of Wyoming.

Race Horse has two alternative holdings. One, the Court construes "unoccupied lands" as being "only lands of that character embraced within what the treaty denominates as hunting districts." *Id.* at 508, 16 S.Ct. at 1077. Thus, because it also held that Article 4's grant of the right to hunt was "temporary and precarious", that right ceased when the land ceased to be part of the hunting districts and came within the authority and jurisdiction of a newly-created state. *Id.* at 508-10, 16 S.Ct. at 1077-78. Two, *Race Horse* holds that under the Equal Footing Doctrine, the act admitting Wyoming into the United States abrogated the treaty-based hunting right, and therefore there was no such right, regardless of whether or not the lands were "occupied."

Race Horse is a much-criticized decision. *See e.g.* F. Cohen, Handbook of Federal Indian Law, (1982 ed.) Ch. 5, Sec. A4 at 268 n. 73 (*Race Horse* is "an anomaly, probably the only case where the Court has held an Indian treaty right extinguished based on doubtful and ambiguous expressions of Congressional intent"); *State v. Arthur*, 74 Idaho 251, 261 P.2d 135, 139 (1953) (finding the doctrine of *Race Horse* to be "repudiated" by subsequent United States Supreme Court cases); *Idaho v. Tinno*, 94 Idaho 759, 497 P.2d 1386, 1392 (1972) (declining to follow *Race Horse*). Similarly, the Equal Footing doctrine has fallen into disfavor as a basis for limiting treaty-based hunting or fishing rights. *See e.g.* Cohen, *supra* at 268 n. 73 ("Application

of the Equal Footing Doctrine to Indian cases has a rather tortured history."); *Sohappy v. Smith*, 302 F.Supp. 899, 912 (D.Ore.1969) ("no merit" to contention that Yakima Indian Nation's treaty-based right to fish in Columbia River were "in some manner altered or affected by Oregon's admission to the Union on an 'equal footing' basis subsequent to the time the treaties" became effective.) Following *Race Horse*, only one United States Supreme Court opinion, also written by the author of *Race Horse*, Justice White, used the "Equal Footing" doctrine to make Indian treaty-based rights subject to state law. *See New York ex rel Kennedy v. Becker*, 241 U.S. 556, 36 S.Ct. 705, 60 L.Ed. 1166 (1916) (fishing rights in New York State).

The rationale of those courts that reject and decline to follow *Race Horse* is very ably laid out in *Idaho v. Tinno*, 94 Idaho 759, 497 P.2d 1386, 1392 (1972). The *Tinno* case arose in circumstances indistinguishable from either this case or the *Race Horse* case. In *Tinno*, the Idaho Supreme Court considered an appeal by a member of the Shoshone-Bannock Tribe challenging the state of Idaho's right to enforce its state fishing regulations against him for fishing off-reservation in violation of those regulations. Mr. Tinno asserted that the same language from the same treaty that had been at issue in *Race Horse* granted him off-reservation fishing rights on unoccupied lands of the United States located in Idaho. 497 P.2d at 1389. The Idaho Supreme Court construed the treaty language granting to the members of the Shoshone-Bannock Tribe "the right to hunt on the unoccupied lands of the United States" to "include a fishing right." *Id.* at 1390. The Idaho Supreme Court then held that the treaty-based fishing right "certainly cannot be regulated by the state unless it

clearly proves regulation of the treaty Indians' fishing in question to be necessary for preservation of the fishery." *Id.* at 1393. In reaching this holding, the Idaho Supreme Court refused to follow the seemingly controlling *Race Horse* case stating: "*Race Horse* and the theory it posited have been entirely discredited by the Supreme Court in [*United States v.*] *Winans*[6] and *Tulee* [*v. State Department of Game of Washington,*][7] and require no further discussion." *Id.* at 1392 n. 6.

Respectfully, this court must disagree with *Tinno* and other cases that hold *Race Horse* is no longer controlling law because *Race Horse* has not been reconsidered or overruled. Notwithstanding the *Tinno* court's interpretation, neither *Winans* or *Tulee* expressly overrule *Race Horse*. *Winans* involved the rights granted pursuant to treaty language dissimilar to the language at issue in *Race Horse* and in this case. That language secured to the members of the Yakima Indian Nation "the right of taking fish at all usual and accustomed places, in common with citizens of the territory." 198 U.S. at 378, 25 S.Ct. at 663. Further, the holding in *Winans* involves a grant of rights along the shore of navigable waters; namely, the Columbia River.

The *Tulee* case further refined the holding of the *Winans* case by holding that the treaty-based right involved in *Winans* was superior to the State of Washington's right to charge a license fee for catching salmon with a net because such a fee would constitute "a charge

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[6] 198 U.S. 371, 25 S.Ct. 662, 49 L.Ed. 1089 (1905).

[7] 315 U.S. 681, 62 S.Ct. 862, 86 L.Ed. 1115 (1942).

for exercising the very right their ancestors intended to reserve." 315 U.S. at 685, 62 S.Ct. at 865. However, the Court also held that the treaty left "the state with power to impose on Indians, equally with others, such restriction of a purely regulatory nature concerning the time and manner of fishing outside the reservation as are necessary for the conservation of fish." 315 U.S. at 684, 62 S.Ct. at 864. In *Tulee*, the Supreme Court cites *Race Horse* as support for the statement that the State of Washington has "broad powers to conserve game and fish within its borders." 315 U.S. at 683, 62 S.Ct. at 864.

Thus, although many courts and commentators have questioned the continuing viability of the *Race Horse* decision, as noted above, the United States Supreme Court continues to cite the case.[8] *See Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 149, 93 S.Ct. 1267, 1270-71, 36 L.Ed.2d 114 (1972) ("*Race Horse* cited as example of Indians off-reservation being held "subject to nondiscriminatory state law otherwise applicable to all citizens of the State"); *Organized Village of Kake Village v. Egan*, 369 U.S. 60, 75, 82 S.Ct. 562, 570-71, 7 L.Ed.2d 573 (1961) (*Race Horse* cited in connection with statement: "Even where reserved by federal treaties, off-reservation hunting and fishing rights have been held subject to state regulation"); *Washington v. Confederated Tribes of Colville*, 447 U.S. 134,

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[8] The citation of *Race Horse* in the Supreme Court's dicta in the case of *Menominee Tribe of Indians v. United States*, 391 U.S. 404, 411- 12, n. 12, 88 S.Ct. 1705, 1710-11, n. 12, 20 L.Ed.2d 697 is ambiguous. In *Menominee* the treaty at issue was entered into *after* statehood and the "*c.f.*" citation to *Race Horse* was in connection with a statement about the exercise of treaty-based rights "on reservation land." *Id.*

179, 100 S.Ct. 2069, 2094-95, 65 L.Ed.2d 10 (1979) (per J. Rehnquist, concurring in part) (*Race Horse* cited in connection with statement: "No immunity for off-reservation activities had traditionally been recognized.")

Where the United States Supreme Court has already determined the legal issue before this court in *Race Horse*, where the underlying fact pattern, including the treaty language at issue, precisely matches that present in the instant case, and where *Race Horse* has not been expressly rejected or overruled, this court must follow the controlling decision. *Jaffree v. Board of School Commissioners of Mobile County*, 459 U.S. 1314, 1315-16, 103 S.Ct. 842, 842-43, 74 L.Ed.2d 924 (1983) (per Justice Powell as Circuit Justice) (federal district court must follow controlling U.S. Supreme Court decision even though it believed the ruling to be in error).

Thus, whether or not this court agrees that the reasoning or holding announced in *Race Horse* is correct, it remains controlling. Absent an express holding by the Tenth Circuit Court of Appeals or the United States Supreme Court that the case is no longer controlling, this court must follow *Race Horse*. Accordingly, the court will grant defendants' Motion for Summary Judgment dismissing plaintiffs' complaint for declaratory judgment that they have an unrestricted right to hunt and fish on Big Horn National Forest lands within the state of Wyoming as reserved in the Treaty with the Crows, 1868.

Unlawful Inclosures Act

Plaintiffs do not state a cause of action seeking to enjoin the remaining two individual defendants from

maintaining the elk fence. The fence is owned and controlled by the State of Wyoming or Wyoming Game and Fish Commission.[9] See Affidavit in Support of Defendants' Motion for Summary Judgment (Arthur D. Reese, Jr.) Initially defendants in this case, the State of Wyoming and Wyoming Game and Fish were dismissed based on Eleventh Amendment immunity from suit.[10] Because it is not possible for the requested relief to be granted via the remaining defendants, the cause of action will be dismissed as to them.[11]

Further, even if they did state a cause of action for which relief could be granted from these defendants, plaintiffs do not have standing to bring an action under the Unlawful Inclosures of Public Lands Act. According to section 1062 of the Unlawful Inclosures Act, "[i]t shall be the duty of the United States Attorney for the proper district, on affidavit filed with him by any citizen of the United States that section 1061 is being violated . . . to institute a civil suit in the proper United States district

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[9] The United States was involved in planning the fence and provided matching funds for its construction.

[10] This court partially granted defendants' Motion to Dismiss and dismissed former defendants State of Wyoming, the Wyoming Game and Fish Commission, and the Wyoming Game and Fish Department on the grounds that their Eleventh Amendment state sovereign immunity had not been waived or abrogated for injunctive or declaratory relief.

[11] Plaintiffs added this cause of action by their Amended Complaint filed on August 5, 1992. Thus, contrary to plaintiffs' contention, the defendants' present motion for summary judgment on the Unlawful Inclosures cause of action could not be a disguised attempt to obtain reconsideration of this court's June 11, 1992 Order denying the motion to dismiss defendants Petera and Repsis.

court or territorial district court, *in the name of the United States. . . .* " 43 U.S.C. § 1062 (emphasis added).

That the Act does not provide for a private cause of action is supported by the fact that if the area of public lands allegedly inclosed by the fence is less than 160 acres, the authority of the Secretary of the Interior must be obtained prior to instituting any such action. 43 U.S.C. § 1066.

Thus, the Unlawful Inclosures Act provides for federal enforcement, but also explicitly defines a role for private citizens in the process – filing an affidavit alerting the United States Attorney for this district of their allegation that the Act is being violated. Once a case is properly commenced by the United States, it is possible for an interested party, such as the Tribe, to obtain permission to intervene. *See e.g. United States ex rel. Bergen v. Lawrence,* 848 F.2d 1502, 1504 (10th Cir.Wyo.1988), *aff'g,* 620 F.Supp. 1414 (D.Wyo.1985) (Wildlife Federations joined as intervenors in Unlawful Inclosures Act case).

Plaintiffs did not comply with sections 1066 and 1062; instead they directly instituted this action for relief. Because this case was not brought in the name of the United States as provided in the Unlawful Inclosures Act, plaintiffs lack standing for their claim for relief under the Act. Accordingly, the court must grant defendants' Motion for Summary Judgment and dismiss their suit for injunctive relief under the Act.

APPENDIX C

4. Treaty with the Eastern Band Shoshoni and Bannock, 1868, July 3, 1868, 15 Stat. 673, Article 4.

> Article 4. The Indians herein named agree, when the agency house and other buildings shall be constructed on their reservations named, they will make said reservations their permanent home, and they will make no permanent settlement elsewhere; but they shall have the right to hunt on the unoccupied lands of the United States so long as game may be found thereon, and so long as peace subsists among the whites and Indians on the borders of the hunting districts.

5. Treaty of Fort Laramie with the Sioux, Etc., 1851, September 17, 1851, 11 Stat. 749.

> Article 5. The aforesaid Indian nations do hereby recognize and acknowledge the following tracts of country, included within the metes and boundaries hereinafter designated, as their respective territories, viz:
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> * * *
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> The Territory of the Crow Nation, commencing at the mouth of Powder River on the Yellowstone; thence up Powder River to its source: thence along the main range of the Black Hills and Wind River Mountains to the headwaters of the Yellowstone River; thence down the Yellowstone River to the mouth of Twenty-five Yard Creek; thence to the head waters of the Muscle-shell River; thence down the Muscle-shell River to its mouth; thence to the headwaters of Big Dry Creek, and thence to its mouth.

* * *

It is, however, understood that, in making this recognition and acknowledgement, the aforesaid Indian nations do not hereby abandon or prejudice any rights or claims they may have to other lands; and further, that they do not surrender the privilege of hunting, fishing, or passing over any of the tracts of country heretofore described.

ARTICLE 6. The parties to the second part of this treaty having selected principals or headchiefs for their respective nations, through whom all national business will hereafter be conducted, do hereby bind themselves to sustain said chiefs and their successors during good behavior.

6. Presidential Proclamation No. 30, February 2, 1897.

PROCLAMATIONS. No. 30.

[No. 30.]

BY THE PRESIDENT OF THE UNITED STATES OF AMERICA

A PROCLAMATION

Whereas, it is provided by section twenty-four of the Act of Congress, approved March third, eighteen hundred and ninety-one entitled, "An act to repeal timber-culture laws, and for other purposes", "That the President of the United States may, from time to time, set apart and reserve, in any State or Territory having public land bearing forests, in any part of the public lands wholly or in part covered with timber or undergrowth, whether of commercial value or not, as public reservations, and the

President shall, by public proclamation, declare the establishment of such reservations and the limits thereof";

And whereas, the public lands in the State of Wyoming, within the limits hereinafter described, are in part covered with timber, and it appears that the public good would be promoted by setting apart and reserving said lands as a public reservation;

Now, therefore, I, Grover Cleveland, President of the United States, by virtue of the power in me vested by section twenty-four of the aforesaid Act of Congress, do hereby make known and proclaim that there is hereby reserved from entry or settlement and set apart as a Public Reservation all those certain tracts, pieces or parcels of land lying and being situate in the State of Wyoming, and within the boundaries particularly described as follows, to-wit:

7. The Act of June 4, 1897, 30 Stat. 11, 39.

CHAP. 1. – An Act Making appropriation for the Department of Agriculture for the fiscal year ending June thirtieth, eighteen hundred and ninety-eight.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the following sums be, and they are hereby, appropriated out of any money in the Treasury of the United States not otherwise appropriated, in full compensation for the fiscal year ending June thirtieth, eighteen hundred and ninety-eight, for the purposes and objects hereinafter expressed, namely:

* * *

For the survey of the public lands that have been or may hereafter be designated as forest reserves by Executive proclamation, under section twenty-four of the Act of Congress approved March third, eighteen hundred and ninety-one, entitled "An Act to repeal timber-culture laws, and for other purposes," and including public lands adjacent thereto, which may designated for survey by the Secretary of the Interior, one hundred and fifty thousand dollars, to be immediately available:

* * *

No public forest reservation shall be established, except to improve and protect the forest within the reservation, or for the purpose of securing favorable conditions of water flows, and to furnish a continuous supply of timber for the use and necessities of citizens of the United States; but it is not the purpose or intent of these provisions, or of the Act providing for such reservations, to authorize the inclusion therein of lands more valuable for the mineral therein, or for agricultural purposes, than for forest purposes.